TAHAN INSURANCE MALAYSIA BHD

v.

ONG CHOO TIAN & ANOR

HIGH COURT MALAYA, PULAU PINANG
RK NATHAN J
[CIVIL APPEAL NO: 12-144-2003]
1 SEPTEMBER 2004

ROAD TRAFFIC: *Negligence - Road accident - Collision between motorcar and 1st plaintiff/third party - Whether accident occurred on a road as defined in s. 2 Road Transport Act 1987 - Whether defendant liable - Road Transport Act 1987, s. 2*

ROAD TRAFFIC: *Insurance - Claim against insurance company - Judgment against insured by 1st plaintiff/third party - Whether insurance company estopped from denying liability by virtue of having defended its insured in an earlier action*

The 1st plaintiff, who had been knocked down by a motorcar driven by one Yeow, had received judgment in her favour consisting of general damages, special damages, interest and costs in an earlier action. The defendant – the insurer of the motorcar – refused to pay; the 1st plaintiff applied for, and received, an order for summary judgment. The defendant appealed, contending that the place where the accident had occurred was a private dwelling where the general public had no access to; thus, the accident did not occur on a road as defined in s. 2 of the Road Transport Act 1987 ('the Act'). Another issue requiring determination was whether the defendant was liable, notwithstanding the fact that the 1st plaintiff was on private property when the accident occurred. The plaintiffs, however, averred that due to the defendant's act of defending its insured in the earlier action, it had waived its rights to object to its statutory liability and was estopped from denying the 1st plaintiff her judgment.

Held (dismissing the appeal):

[1] Prior to Yeow engaging the wrong gear and causing the motorcar to propel forward, the said motorcar was indeed on a five-foot way in front of the house. It was from this five-foot path that the car jerked forward to collide into the 1st plaintiff. The defence did not challenge the fact that the car was initially upon the five-foot path and that even if it was on the five-foot path, that the said path was not a public thoroughfare but confined only to the occupants of the said house and thus not open

to the public to move about. In the absence of any such challenge, there was a clear concession that the car was at a place where the public had access to, from which it collided into the 1st plaintiff, although the place of collision was within the compound of the said house at the moment of collision. (p 274 e-h)

[1a] This court could not and ought not separate the series of acts of Yeow on that eventful day. At the precise moment when the negligent act occurred, part of her car was clearly on the road. The subsequent act of wrongly putting the car into forward motion and thus causing the injury was the negligent act, arising out of the use of the car on the road. In the present case, the series of acts were so close and proximate that the negligent act occurred just out of the use of the road, and the defendant was therefore liable. When the negligent act occurred, at least a part of the car had been on a road as defined in s. 2 of the Act. (pp 275 h, 276 a & 277 a-b)

[2] The defendant was from the outset non-committal; it defended its insured with the intention of mitigating its liability and negotiated quantum to reduce the sum payable. Although the defendant put it on record that its defence was not to be constructed as waiving its right to repudiate a recovery claim, any reservation of its rights ought to be, *vis a vis*, between the defendant and its insured and driver. It could not place any condition against any third party from making a recovery claim against it for bodily injuries pursuant to its statutory liability. Since the defendant did not seriously challenge the negligence attributed to its driver, nor did it seriously seek any contribution against the 1st plaintiff, then the reasonable thing the defendant ought to have done was to admit liability and negotiate damages, and then with the consent of the 1st plaintiff's solicitors, seek determination from the court as to its liability, based on s. 2 of the Act, that is that the accident did not occur on a road as defined under s. 2 of the Act. As it was, by its conduct, the defendant was also estopped from denying liability, having defended the insured in the earlier suit. (p 278 b-e)

Case(s) referred to:

Evans v. Employers Mutual Insurance Association Ltd [1935] All ER Rep 659 ***(foll)***
Griffin v. Squires [1958] 3 All ER 468 ***(refd)***
Harrison v. Hill [1932] SC (J) 13 ***(refd)***
Oxford v. Austin [1981] RTR 416 ***(refd)***
Randall v. Motor Insurance Bureau [1969] 1 All ER 21 ***(foll)***

Legislation referred to:
Road Transport Act 1987, ss. 2, 90(1)

Road Traffic Act 1960 [UK], s. 203(3)(a)

For the appellant/defendant - J Theeba Jothi; M/s Kumar & Co
For the respondents/plaintiffs - P Navaratnam (P Balachandran); M/s Syarikat P Subaiyyah

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

The Action

This is a recovery action by an injured plaintiff (the 1st plaintiff) and the 2nd plaintiffs are the firm of solicitors that represented her in the earlier action. The defendants in this recovery action are the insurers of the motor car PDJ 1923 which was driven by one Yeow Swee Kee (Yeow) and owned by one Vin Kew Enterprises Sdn. Bhd. (Vin) and who were sued as defendants in the earlier action.

The Earlier Action

The plaintiff who was 54 years old at the time of the accident stated in evidence that on 18 January 1997 at about 7.30pm she was knocked down by a motor car PDJ 1923 driven by Yeow in front of house No. 7, Jalan Bunga Raya Dua, Butterworth (the said house). Although she said that the motor car belonged to her son, it must have belonged to her son's company, Vin. Her daughter-in-law who seldom drove the said car was at the driver's seat. That evening she was returning home to the said house which belonged to her husband. As she reached the gate she noticed that the car was near the gate with the engine running. However she noticed that the rear of the car was already at the five-foot way in front of the house. Realising that the car was going to reverse further she walked to the front by going along the left of the car. As she reached the front, suddenly, instead of reversing, the car moved forward and rammed into her. She could not move anywhere else and she fell unconscious. After calling the investigating officer as her next witness, the plaintiff closed her case.

At the outset of the trial, Mr. Theeba Jothi who also acted for the defendants in the earlier action had informed the Sessions Court that he was instructed to defend without prejudice to the rights of the insurers to disclaim liability in respect of any recovery action to be filed by the plaintiffs against the insurers in respect of their statutory liability to third party claims under s. 90(1) of the Road Transport Act 1987 (the Act) which reads as follows:

90. Motor vehicle users to be insured against third party risks.

(1) Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such as security in respect of third party risks as complies with the requirements of this Part.

General damages and special damages were agreed to at RM68,000 with interest at 8% per annum from date of filing of the action ie, 11 September 1997 to date of settlement and special damages amounting to RM21,279.95 with interest at 4% from date of accident ie, 18 January 1997 to date of judgment ie, 13 November 1999 and thereafter at 8% per annum from date of judgment to date of settlement and costs of RM11,840 with no order as to interest. There was agreed costs to the 2nd plaintiff amounting to RM7,637.

After the plaintiff had closed her case the defendant driver although present in court, did not testify and elected to offer no evidence. The learned Sessions Judge had no difficulty in finding the defendants liable on a 100% basis and entered judgment for the plaintiffs with interest and costs.

The Recovery Action

The plaintiffs then demanded settlement from the insurers who refused to pay contending that since the accident occurred within the compound of the said house they had no liability to meet.

They relied on the definition of the word "road" as stated in s. 2 of the Act which reads as follows:

(a) any public road and any other road to which the public has access and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, round-abouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use; and

(b) for the purposes of sections 70 and 85, also includes a road under construction.

In the light of the firm stand taken by the insurers the 1st plaintiff sued the insurers for recovery of the damages interest and costs and the 2nd plaintiff, the firm of solicitors, sued for their agreed costs.

The plaintiffs then took out proceedings for summary judgment against the defendant and on 5 March 2003 obtained an order for same.

This is the defendant insurers appeal against that judgment.

Findings Of This Court

In his affidavit in reply, Mr. Theeba Jothi averred that the accident occurred when Yeow engaged the wrong gear, and thus caused the injury to the plaintiff who was then standing in front of the car. This information counsel had obtained from Yeow's police report, a copy of which he had annexed to his affidavit. He also referred to the agreed key and sketch plan which showed that the collision had indeed occurred within the compound of the said house.

Since the place where the accident had occurred was a private dwelling where the general public had no access to, counsel contended that the said place did not fall within the definition of road as envisaged in s. 2 of the said Act.

Whilst not denying that there was a valid insurance cover and that the plaintiffs had given the due statutory notice, the defendant conceded that the only issue was that the accident did not occur on a road as defined in s. 2 of the said Act.

To my mind what has not been disputed by the defendant and which is in evidence is that prior to her engaging the wrong gear and causing the motor car to propel itself forward, the said motor car was indeed on the five-foot way in front of the house. The plaintiff had testified that the main gate to the house was ajar when she was coming to her house and as the tail end of the car was out on the five-foot path, and as she realised the car was going to be reversed further, she moved to the front. It was from this five-foot path that the car jerked forward to collide into the plaintiff. I cannot by any stretch of the imagination not hold that a five-foot path or way is not a public thoroughfare. The defence did not challenge

(a) the fact that the car was initially upon the five-foot path and that

(b) even if it was on the five-foot path, that the said five-foot path was not a public thoroughfare but was confined only to the occupants of the said house and thus not open to the public to move about.

In the absence of any challenge on either of the two issues there is a clear concession that the car was at a place where the public had access to, from which it collided into the plaintiff, although at the moment of collision the place of collision was within the compound of the said house.

In *Griffin v. Squires* [1958] 3 All ER 468 Lord Parker CJ held that it was for the court to decide "whether a certain space is a road". Kilner Brown J after considering a number of authorities including *Griffin v. Squires* said in *Oxford v. Austin* [1981] RTR 416:

> That leads me to say in all these cases there is a well established process which is founded on findings of fact. The first question which has to be asked is whether there is in fact in the ordinary understanding of the word a road, that is to say, whether or not there is a definable way between two points over which vehicles could pass. The second question is whether or not the public, or a section of the public, has access to that which has the appearance of a definable way.

Of course in *Griffin v. Squires* the issue was whether a car park could be considered a road and the court held that notwithstanding the fact that there was an ingress to the car park from the highway and an egress from the car park leading out to the road, nobody in the ordinary acceptance of the word 'road' would think of a car park as a road. However the court was also of the view that to hold a car park as a road there must be some evidence to show that in addition to being a car park, the place is used, *inter alia*, as a thoroughfare or shortcut for vehicles between two points outside of it.

As Lord Sands said in *Harrison v. Hill* [1932] SC (J) 13 at p. 17:

> Any road may be regarded as a road to which the public have access if it is a road upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of a prohibition express or implied.

In the circumstances therefore it is clear that in respect of the case before me, the public indeed had access to the five-foot path. I would have thought that if there indeed was any dispute that the five-foot path was not open to the public, the defendant would have at least produced photographs showing the five-foot path and the restrictions if any, to take it off from falling into the category of 'a road'.

The next issue to consider is whether the defendant insurers are liable notwithstanding the fact that when the accident occurred the plaintiff was on private property.

To my mind this court cannot and ought not separate the series of acts of the defendant driver Yeow on that eventful day. Firstly she was unfamiliar with the use of that car. Yet she attempted to drive it. When the first step towards establishing negligence on the part of Yeow was established, the plaintiff's evidence showed that the car was in a reversed position and on the five-foot path. In other words as held by me, the car was on the road. Obviously Yeow intended to reverse out onto the main road. Instead of engaging the reverse gear she had, as admitted in her police report engaged the forward gear. At the precise moment when the negligent act occurred, part of her car was clearly on the road. The subsequent act of wrongly putting the car into forward motion

and thus causing the injury was the negligent act, arising out of the use of the car on the road. I am fortified in holding this view by referring to the case of *Randall v. Motor Insurance Bureau* [1969] 1 All ER 21. The facts of that case were that a motor lorry driven by S was on a driveway on private land. As S drove from the driveway to the adjacent road the offside wing of his lorry struck the plaintiff causing him to fall. The rear wheel then ran over the plaintiff's left leg causing serious injury. At the time when the wheel passed over the plaintiff's leg the front wheels of the lorry were on the road. The plaintiff obtained judgment against S for damages for personal injuries, but the judgment was not satisfied. On the question whether the plaintiff's injury was caused by, or arose out of, the use of a vehicle on a road, under s. 203(3)(a) of the Road Traffic Act 1960, so as to make the defendants liable under their agreement of 17 June 1946, with the Minister of Transport for any unsatisfied judgment in respect of third party liability, the court held that at the time when the injury was sustained since the greater part of the lorry was on the road, therefore the lorry was using the road and, accordingly, the defendants were held liable under the agreement of 17 June 1946.

Megaw J said at p. 24 as follows:

> The one and only question in dispute is: Was it bodily injury caused by, or arising out of, the use of the Dodge lorry on a road? In my judgment, the answer to that question on the facts of this case is "Yes". I have no doubt that in common sense and in the ordinary use of language the lorry was being used on a road – Hillsborough Road – at the time when the Plaintiff sustained the serious injury of which he complains. If anything turns on the precise time of the incident, which, again as a matter of common sense, cannot be divided into a series of separate incidents, the determining factor is the time when the wheel of the lorry ran over the Plaintiff's leg. At that time the greater part of the lorry was on the road, and the lorry as a whole was using the road. The fact the rear part of the lorry including the wheel which ran over the Plaintiff's leg, was still, just, on private property does not, in my view, affect the conclusion that the lorry was then using the road. It was the use of the lorry on the road – the fact that it was being driven further on to the road in order to drive away along the road – which caused the injury. Certainly the injury arose out of the use of the lorry on the road. The fact that the Plaintiff, when he was injured, was still – though only just – on private property and that the wheel which caused the injury was still, just, on private property does not, to my mind, affect the conclusion. The Plaintiff therefore succeeds in his claim.

In the present case as I said, the series of acts are so close and proximate that just out of the use of the road, the negligent act occurred and the defendants are therefore liable. One has to clearly distinguish this case from the case of a defendant driver, who having driven along the highway and subsequently having entered into the compound negligently collides into a third party in the compound. The issue for the court to decide is how proximate was the resultant collision to his entry into the private premises from the road. In other words, when the negligent act occurred, at least a part of the car must have been on a road as defined in s. 2 of the Act. On this issue therefore, I find for the respondents.

Waiver

Mr. Navaratnam for the respondents raised the issue of waiver. He contended that by the insurers defending their insured in the earlier action they had waived their rights to object to their statutory liability and were estopped from denying the plaintiff his judgment. Counsel relied on the case of *Evans v. Employers Mutual Insurance Association Ltd.* [1935] All ER Rep. 659. The facts of the case were as follows:

The proposal form on which a policy insuring a motor car was based contained an untrue statement. An accident occurred which resulted in the insured making a claim under the policy for damage to the car and for liability which he had incurred to third parties. The fact that the statement was untrue came to the knowledge of a clerk in the employment of the insurance company when, in the course of his duty, he compared the proposal form with the claim form which the insured sent in at the insurance company's request, but the clerk wrongfully neglected to inform the claims superintendent, the servant of the company whose duty it was to decide whether to admit the claim.

The insurance company made payments to the insured in respect of the damage to his car and person, and thereupon, pursuant to the policy and with the assent of the insured, took on the conduct of the negotiations with and resistance to the claims of the third party. Subsequently, the claims superintendent became aware of the untruth of the statement in the proposal, and the insurance company repudiated liability. On a claim by the insured based on the policy, the insurance company contended that it did not know of the untruth of the statement until it was discovered by the claims superintendent.

The court held that the insurance company was not entitled to repudiate liability because (i) the knowledge of the untruth acquired by the clerk in the course of his duty of comparing the forms was the knowledge of the company which had delegated that duty to him; (ii) having requested the insured to send them the information contained in the forms, and having received the forms, the

company could not be heard to say they did not know of their contents, ie, of the untruth which the forms revealed, on the ground that the forms were not dealt with by the proper official; (iii) by making the payments to the insured the company had affirmed the policy after it had notionally become aware of the true facts, and, as the insured thereupon relinquished his rights to deal with the third-party claims, the company were precluded from repudiating liability.

Looking at the facts of the case before me the defendant insurers were from the outset noncommittal. They wanted to have the best of both worlds. They defended their insured with the intention of mitigating their liability and negotiated quantum to reduce the sum payable. Although they put it on record that their defence was not to be constructed as waiving their right to repudiate a recovery claim, it is my judgment that any reservation of their rights ought to be, *vis a vis*, between the defendants and their insured and driver. There is a statutory liability to meet in respect of third party claims. They cannot place any condition against any third party from making a recovery claim against them for bodily injuries pursuant to their statutory liability.

Since from the evidence I note that the defendants did not seriously challenge the negligence attributed to their driver, nor did they seriously seek any contribution against the plaintiff, then the reasonable thing the insurers ought to have done was to admit liability and negotiate damages and then with the consent of the plaintiff's solicitors to seek a determination from the court as to their liability, based on s. 2 of the Act, that is that the accident did not occur on a road as defined under s. 2 of the Act. As it is, by their conduct, the defendant insurers are also estopped from denying liability, having defended the insured in the earlier suit.

I therefore have no hesitation in dismissing this appeal. The appellants are therefore liable to satisfy the judgment sum with costs.